IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 205 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HARIJAN GABHABHAI PETHABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 205 of 1993

MR CH VORA for Petitioner No. 1-4

Ms Hansaben Punani, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 20/01/2003

ORAL JUDGEMENT

This is a revision application under section 397 of the Code of Criminal Procedure, 1973 (for short, 'the

Code') challenging the judgment and conviction order recorded by the learned Sessions Judge, Kachchh at Bhuj in Criminal Appeal No.16/92 whereby the learned Sessions Judge rejected the appeal of the present applicants by judgment and order dated 27.5.1993.

2. It seems from the record that the present applicants along with one Gosai Karsangar Mangalgar were all charge sheeted for offences under sections 4 and 5 of the Bombay Prevention of Gambling Act, 1887, (for short, 'the Act). It was alleged against the applicants and the co-accused that the PSI, Nakhatrana received an information that one Gosai Karsangar who is not an applicant before this court, was running a common gaming house in a house occupied by his wife. Accordingly search warrant was obtained from the competent authority and even Dy.S.P. also remained present at the time of search. The said PSI accordingly carried out search of the said house on 15.8.1990. As soon as the police raiding party reached the said place, the present four applicants had thrown the cards on the floor. Ultimately, panchnama was drawn and the cards and money were recovered. Investigation was undertaken and at the end of investigation, charge sheet was filed for offence punishable under sections 4 and 5 of the said Act against the present four applicants and Gosai Karsangar as accused No.5. All of them were tried before the learned JMFC, Nakhatrana and after going through the trial, they were convicted for the aforesaid offence. The present applicants were convicted for offence under section 5 of the said Act whereas accused no.5 was convicted for offence under section 4 of the said Act. These applications were sentenced to suffer R.I. for two months. They were required to pay fine of Rs.300/- in default seven days simple imprisonment. This court is not concerned with the punishment awarded to accused no.5. All the five accused persons preferred the aforesaid appeal being Criminal Appeal No.16/92. The learned Sessions Judge found accused No.5 that Gosai Karsangar was not proved to have been running a common gaming house and, therefore, his appeal was allowed and he was acquitted of the offence under section 4 of the said Act. By the said judgment and order, the learned Sessions Judge dismissed the appeal of the present applicants. Hence the present revision application.

3. It has been mainly contended here that the two courts below have committed serious illegality in convicting the present appellants and when accused no.5 was acquitted, there was no material to hold that the gaming house was being run at the aforesaid place. That

even a presumption could not arise in favour of the prosecution when the charge sheet showed that the applicants were gaming in Rummy. That therefore, the approach of the learned Sessions Judge was not in accordance with the record and, therefore, the judgment and order of the learned Sessions Judge in the aforesaid appeal are illegal and deserve to be set aside. The applicants have, therefore, prayed that the present revision be allowed and the judgment and order of the two courts below be set aside and the present applicants be acquitted of the charge levelled against them. The Revision was admitted and notice was issued to the State. In response to the service of the notice, Ms. Hansaben Punani, learned APP appears on behalf of the respondent-State. I have heard the learned Advocates for the parties and have perused the papers. In fact, the learned Advocates for the parties have taken me through the judgments of the two courts and the record of the trial court.

4. Learned Advocate for the applicants has argued at length that when accused no.5 has been held not guilty for an offence under section 4 of the said Act by the Sessions Court, it could not be concluded that the common gaming house was being run at the place in question. In support of the said contention, he has relied on a decision of the Hon'ble Apex Court rendered in the case of Bhimrao Trimbakrao Ingle v. State of Maharashtra, (AIR 1987 SC 533). The pertinent observations can be gathered from para 3 of the said judgment which are reproduced for ready reference:

> "Even through on an appreciation of evidence adduced by the prosecution the Sessions Court came to the conclusion that the prosecution had failed to establish that appellant no.6 was deriving any profit or gain by way of charges for the use of the room in question and that accordingly it was not a 'common gaming house', the Court strangely enough held that it was a common gaming house within the meaning of Section 3(ii) of the Act by reason of the presumption under Section 7 of the Act. What was held to be not a 'common gaming house', having regard to the fact that evidence adduced by the prosecution was considered unacceptable could not have been held to be a common gaming house by recourse to the presumption under section 7. The presumption is a rebuttable presumption which was not required to be rebutted by the defence inasmuch as the prosecution evidence was discredited and rejected

> and the presumption stood rebutted on that account. What is not a 'common gaming house' in fact in the light of evidence cannot become a common gaming house by reason of presumption under section 7. The reason is neither far to seek nor obscure. What the prosecution is required to establish by recourse to the presumption is that the room is a 'common gaming house' as defined in the dictionary (definition?) of section 3(ii) that is to say that the occupier is collecting charges for the use of the room. When evidence is adduced and the prosecution fails to establish that such charges are in facta collected, how can the Court hold in the face of its own finding, that charges are not collected, that even so it is a 'common gaming house' because of the presumption? The Sessions Court was, therefore, in error in convicting the appellants for an offence under section 5 which can be committed only provided the persons concerned were gaming or were present for the purpose of gaming in a 'common gaming house'. The High Court was in error in failing to appreciate the import of the finding recorded by the Court on the basis of the appreciation of evidence that in fact it was not a 'common gaming house' as found by the Sessions Court, and confirmed by the High Court. None of the appellants could therefore be convicted for an offence under section 5. (Section 5 : "Whoever is found in any common gaming house, gaming or present for the purpose of gaming shall, on conviction, be punishable with imprisonment which may extend to six months and with fine...)".

5. In the present case also accused no.5 has been held not guilty and it is not proved on record that he was running a common gaming house at the place raided by the investigating police officer. Therefore, the factual aspect shows that as per the finding of the first Appellate Court, the aforesaid place was not being run as a common gaming house by accused no.5. Then it is nobody's case that someone else was running a common gaming house there. In other words, it is not the case of the prosecution that someone else other than accused no.5, was running a common gaming house at the place raided by the Investigating Officer. Even the learned Sessions Judge has also recorded the finding that accused No.5 was not running the common gaming house at the said place. This clearly shows that the common gaming house

was not being run at the place in question. When a common gaming house was not being run at a particular place, the persons found present there cannot be convicted for an offence punishable under section 5 of the said Act, on the basis of presumption under section 7 of the said Act. It is well settled that presumption is always rebuttable and when the finding of fact recorded by the learned Sessions Judge is that it was not a common gaming house run by accused no.5, then the said place cannot be treated to be a common gaming house under a presumption under section 7 of the Act. In other words, when on fact, a place is not found to be a common gaming house, it cannot be treated to be a common gaming house under section 7 of the Act. Even otherwise, the charge sheet makes it clear that as per the case of the State, the petitioners were gaming in Rummy. It is well settled that Rummy is a game of skill and not a game of chance. (State of Andhra Pradesh v. K Satyanarayana and Ors., AIR 1968 SC 825). It is not much in dispute that before a game can be said to be a prohibited game, it must be a game of chance. In other words, a game with cards which involves skills and not chances cannot be treated to be gaming for the purpose of the said Act.

6. So on the one hand, according to the case of the prosecution found in the charge sheet, the applicants were playing in Rummy with cards and money which cannot be treated to be gaming for the purpose of the said Act and the applicants cannot be and could not be convicted for the offence of gaming if they were allegedly playing Rummy with cards and money. On the other hand, the presumption will stand rebutted when a finding of fact has been recorded by the learned Sessions Judge that accused no.5 was not running the common gaming house at the place in question. It is also required to be considered that even according to the finding of fact by the learned Sessions Judge, it is not proved on record that the raid was carried out in respect of the house standing in the name of the wife of accused no.5. The learned Sessions Judge has found in para 11 that as per the evidence of panch witness at Exh.17, the aforesaid place was occupied by a Teacher namely; Sreemali. The said teacher is not a witness of the prosecution. He did not go to the trial court and there is no material to show as to how the said teacher was dealing with the possession of the said house. This would further show that the information received by the police officer that the said house was occupied by the wife of accused no.5 was not properly verified and the information was found to be incorrect. Any way, in view of the aforesaid facts and circumstances, it is very clear that the present

applicants could also not be convicted for an offence under section 5 of the said Act. In above view of the matter, the judgment and conviction order recorded by the two courts below are illegal and, therefore, it would be appropriate for this court to interfere with the said finding and conviction recorded by the two courts below.

7. For the foregoing reasons, when the judgments and orders of the two courts below are found to be illegal, the only alternative with this court is to allow this revision application and set aside the conviction orders recorded by the two courts below. This revision application is allowed accordingly. The judgment and conviction order recorded by the two courts below are quashed and set aside qua the present applicants. The present applicants are ordered to be acquitted of the offence punishable under section 5 of the Bombay Prevention of Gambling Act, 1887. Their bail bonds are cancelled. Rule is made absolute accordingly.

20.1.2003 [D P Buch, J.]
msp